

# The POWER of the President

By Michael Van Alstine

*When it comes to foreign affairs, the executive branch holds sway. Or does it? A modern resurgence of an historical controversy.*

In an era marked by increasing globalization as well as international terrorism, the scope of the “executive Power” vested in the president by Article II of the Constitution has assumed a special significance. The subject is by no means new or novel, however. Controversies over presidential power in foreign affairs have existed from the very founding of the republic. Indeed, executive branch advocates as early as Alexander Hamilton have argued that, in matters of foreign affairs, the President possesses implied, and perhaps even inherent, constitutional powers. Now, recent assertions of executive authority by the present administration against the backdrop of national security concerns have returned this issue to the center of modern legal and political debate.

A prime cause for this continuing controversy is the Constitution’s schizophrenic dispersal of power in foreign affairs. Article I grants to Congress the power, among others, to declare war, to define “Offences against the Law of Nations,” and to regulate foreign commerce as well as the most sensitive international

law issues of its day (such as piracy and reprisals for international offenses). On the other hand, Article II confers on the President the power to “make Treaties,” the status of commander-in-chief, and substantial control over ambassadorial relations.

Notwithstanding this diffusion of power, executive branch advocates throughout history—including Alexander Hamilton and then-congressman John Marshall—have argued that certain more general constitutional principles function as a broad grant of independent

executive authority, both to manage foreign affairs obligations and to enforce those obligations as a matter of domestic law. The first such general principle is the mandate in Article II, Section 3, that the president “take Care that the Laws be faithfully executed.” Proponents have seized on this clause to argue that, because the President controls the expression of consent to treaties and other international law obligations, he (or she) also has power to see that those “laws” are enforced as a matter of supreme federal law.

The second general argument is more abstract, but no less powerful. Founded on an essentialist understanding of the nature of a national executive, it holds that Article II, Section 1’s foundational “vesting” of “[t]he executive Power” in the president represents an affirmative grant of authority that extends beyond mere enforcement of already-existing law. At its most expansive, this view claims that all powers traditionally held by an executive in 1789 inhered in our President without the need for enumeration in constitutional text. And in no field have national executives played a more prominent role than in foreign affairs, a fact that in the United States is aided by the express delegations on treaty-making and ambassadorial relations. As a result, the theory runs, the president has an independent power both to define and manage our foreign affairs obligations and, as required, to enforce those obligations in domestic law.

The Supreme Court itself has bolstered this broad conception of presidential power through an historical penchant for expansive rhetoric on executive authority in foreign affairs. In the prominent 1936 case *United States v. Curtiss-Wright Export Corp.*, for example, the Court declared that the president is the “sole organ” of the United States in its external relations. More recently, it stated in *American Insurance Ass’n v. Garamendi* (about which more below) that the “historical gloss on the ‘executive Power’” of Article II has conferred on the president “a degree of independent authority to act in foreign affairs” that “does not require as a basis for its

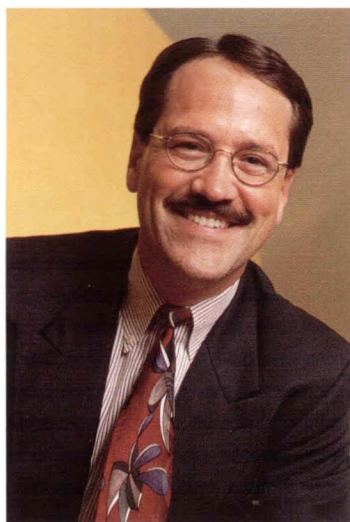






Illustration by Kevin McSherry

exercise an act of Congress.”

The Court has appeared to draw the line, however, at executive branch claims of an independent authority to create domestic law whenever a matter touches on foreign affairs. As the Court famously declared in *Youngstown Sheet & Tube Co. v. Sawyer*—in rebuffing President Truman’s attempt to seize steel mills during the Korean War— “[i]n the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” Most recently, it decisively rejected President Bush’s assertion of an independent authority to create special military tribunals for international terrorists. In last summer’s *Hamdan v. Rumsfeld* opinion, the Court—quoting the landmark Civil War era case of *Ex parte Milligan*—affirmed that even during wartime the power to establish such tribunals is a legislative one and thus “can derive only from the powers granted jointly to the President and Congress.”

Substantial doubts nonetheless remain about the Supreme Court’s faithfulness to these seemingly unequivocal assertions. Indeed, two major issues are percolating (with limited public awareness) that could have a profound effect on the constitutional allocation of lawmaking authority within the federal government.

The first relates to so-called “sole executive agreements.” Presidents have made such international law agreements with foreign countries without the advice and consent of the Senate since the Washington administration, including nearly 15,000 in the last fifty years alone. When limited—as they traditionally have been—to the routine management of external foreign relations, these agreements raise few if any constitutional concerns.

In a little-noticed 2003 opinion, however, the Supreme Court broadly declared in *American Insurance Ass’n v. Garamendi* that such agreements “generally ... are fit to preempt state law, just as treaties are.” In specific, it concluded that certain executive agreements made by President Clinton to resolve private claims from World War II preempted a California law requiring disclosure of Holocaust-era insurance policies—even though the agreements in no way addressed that issue.

The problem here arises from the breadth of this holding. As I have argued elsewhere, if the President has an independent power to create supreme federal law in this way, then he could, for example, preempt state tort claims or consumer protection statutes merely by concluding a corresponding agreement with, say, Liechtenstein. Such an outcome runs contrary to the Constitution’s carefully crafted requirement of inter-branch cooperation for the creation of supreme federal law.

The second major issue relates to the President’s power to enforce international law in general. The Supreme Court recently agreed to hear a case that tests whether the President has a unilateral authority to compel compliance with a decision of the International Court of Justice. That decision found that the United States had failed to fulfill certain treaty obligations for fifty-one Mexican nationals on death row. In a mere memorandum to Attorney General John Ashcroft,

President Bush then ordered state courts to grant another review for the Mexican nationals, even though they had already exhausted all appeal rights. This memorandum led the Supreme Court to dismiss a case then pending before it that sought direct enforcement of the ICJ’s decision. Following subsequent proceedings in Texas state courts, the matter is now again before the Supreme Court in *Medellin v. Texas*.

What is important about this case is the scope of the President’s assertion of authority in the memorandum. The Administration has argued that neither the treaty at issue nor the ICJ’s decision is directly enforceable in domestic law. It nonetheless asserts that the president has a broad, independent, and discretionary power to decide whether, and if so the extent to which and in what manner, foreign affairs obligations operate as supreme federal law. If accepted, this proposition would result in a substantial transfer of lawmaking power to the President, for—outside of formal treaties—the executive branch has near exclusive control over the creation of foreign affairs obligations in the first place. The problem, in short, is that the executive branch is not the constitutionally prescribed agency for the domestic enforcement of presidential policy preferences in foreign affairs. Fidelity to the separation of powers doctrine thus requires that the Supreme Court tread carefully this fall as it takes up the case of *Medellin v. Texas*.

*Professor of Law Michael Van Alstine is also the Associate Dean for Research and Faculty Development. An accomplished scholar in international and domestic private law, his research interests focus on the domestic law application of international law through the vehicle of treaties.*